

No. 92252

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

ELTON NORFOLK,

Appellant.

Appeal to the Supreme Court of Missouri
from the Circuit Court of the City of St. Louis, Missouri
Twenty-Second Judicial Circuit, Division 20
The Honorable Donald L. McCullin, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

Respectfully submitted,

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Jurisdictional Statement

Appellant adopts and incorporates by reference the Jurisdictional Statement from his opening brief.

Statement of Facts

Appellant adopts and incorporates by reference the Statement of Facts from his opening brief.

Reply Argument

I.

The trial court clearly erred in overruling Appellant's motion to suppress evidence and in overruling Appellant's objections to (a) the admission of State's Exhibit 2, the gun, State's Exhibit 3, the magazine from inside the handgun, State's Exhibit 4, cartridges, and State's Exhibit 7, the marijuana, and (b) Officer Reynolds' testimony relating to the seizure of the said evidence because the evidence was obtained as the result of an unlawful search and seizure, in that Officer Reynolds lacked reasonable suspicion under Terry v. Ohio to detain Appellant. Appellant pulling up his pants was insufficient to provide reasonable suspicion for Appellant's stop because the officers never saw a weapon and had no reason to believe that Appellant was engaged in criminal activity at the time Officer Reynolds stopped Appellant. The court should have suppressed Officer Reynolds' testimony about the seizure and the evidence seized as fruit of the poisonous tree.

Preservation of Error

The State argues that Appellant's point is unpreserved regarding Officer Reynolds' testimony about the gun and the marijuana (Resp. Br. 13). The State asserts that this defect changes the standard of review to plain error (Resp. Br. 13). But a review of the record reveals that the trial court ruled on the merits of the suppression issue — preserving the claim for review (L.F. 23-27; Tr. 1, 15-19, 26, 27, 29-30, 52-53, 56-57).

First, Appellant filed a motion to suppress evidence and a hearing was held (L.F. 23-27; Tr. 1-19). During the suppression hearing, Officer Reynolds testified about

arresting Appellant (Tr. 2-14). After the hearing, the trial court denied Appellant's motion to suppress (Tr. 19). At Appellant's bench trial, defense counsel made timely objections to the admission of testimony and evidence on the grounds in Appellant's motion to suppress (Tr. 26, 27, 29-30). The trial court overruled defense counsel's objection (Tr. 26, 27, 29-30).

In State v. Martin, 79 S.W.3d 912, 915 (Mo. App. E.D. 2002), the only issue raised on appeal was the trial court's failure to suppress evidence seized from Martin. In Martin, defense counsel stated "no objection" to the State's offer of the pipe at trial. Id. The Eastern District found counsel's statement "no objection" when evidence was introduced did not constitute an affirmative waiver of appellate review of the issue. Id.

In reaching this conclusion, the Eastern District noted that defense counsel filed a written motion to suppress before trial and reasserted the motion at the start of trial. Id. The trial court then ordered the motion taken with the case and denied the motion after the presentation of the evidence at trial. Id. Despite counsel's response of "no objection" to the admission of the pipe, the Eastern District found the trial court and opposing counsel understood that Martin's counsel did not intend to waive the issue contained in the motion to suppress the evidence. Id., citing State v. Stillman, 938 S.W.2d 287, 290 (Mo. App. W.D. 1997). Therefore, the Eastern District reviewed the denial of Martin's motion to suppress the pipe evidence.

As in Martin, this Court must find the trial court and opposing counsel understood that Appellant's counsel never waived the issue contained in the motion to suppress the evidence and review it on its merits (Tr. 26, 27, 29-30). Id.

The State also argues that Appellant failed to raise the objection to Officer Reynolds' testimony in his brief in the Eastern District (Resp. Br. 13). The State argues Appellant altered the basis of his claim by adding the objection about the testimony, citing 83.08(b) (Resp. Br. 13). Citing Linzenni v. Hoffman, 937 S.W.2d 723, 727 (Mo. banc 1997), the State requests this Court decline to review Appellant's argument about Officer Reynolds' testimony (Resp. Br. 13). In Linzenni, the appellant raised new issues that were not raised in the brief before the court of appeals and this Court found an appellant may not "alter the basis of any claim that was raised in the brief filed in the court of appeals." Id. Appellant's case is distinguishable because Appellant did not alter the basis of his claim or add a new claim. The claim was and always has been a Fourth Amendment issue.

Despite any ambiguity in the initial Court of Appeals brief, the Eastern District reviewed the suppression of both the physical evidence and the testimony. State v. Norfolk, --- S.W.3d ----, 2011 WL 5541791 at 5 (Mo. App. E.D. 2011). Transfer of cases from the Court of Appeals to the Supreme Court presents to this Court all questions presented by the record for its determination. See Moyes v. St. Louis, I.M. & S. Ry. Co., 186 S.W. 1027, 1029 (Mo. 1916); Rule 83.09; See also Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985) (After case has been decided by Court of Appeals and subsequently transferred to the Supreme Court, the Supreme Court reviews case on transfer as though on original appeal, and the Court of Appeal's opinion is of no precedential effect).

Because the allegation of error was sufficiently particular to apprise the trial court

and this court of the ruling under attack and the reasons, this Court should use the clearly erroneous standard of review to examine whether the trial court should have allowed the admission of the gun, the magazine from inside the handgun, cartridges, the marijuana, and Officer Reynolds' testimony relating to the seizure of the said evidence, and not resort to plain error review.

Analysis

The State cites United States v. Maher, 145 F.3d 907, 908-909 (7th Cir. 1998), where an officer was justified in making an investigatory detention of the defendant after hearing gunshots and seeing the defendant "clutching" his right, front pants pocket. In a previously unpublished order,¹ the Seventh Circuit noted that the area was known for previous gunfire occurrences and the officer had been dispatched because gunshots were heard at the location immediately prior to the officer seeing the defendant, that the defendant had seemed nervous and was clutching his front pants as he approached the patrol car, and that the defendant fled in order to avoid a pat-down search. Id. at 908.

Appellant's case is distinguishable from Maher in a number of ways. First, in Maher, the officer was specifically dispatched because gunshots were heard at the location immediately before to the officer saw the defendant, making it reasonable to believe that criminal activity was afoot. Id. at 908. In Appellant's case, Officer Julie Reynolds was patrolling the area because there had been some recent robberies, but

¹ This opinion was published in response to the government's motion to publish. Id. at 907, fn 1.

nothing in the record suggested that these robberies happened that night at the corner where Appellant was standing (Tr. 3, 22). Second, Maher is distinguishable because nothing in the record suggested Appellant was nervous or that Appellant “clutched” his pants (Tr. 3, 23). Id. at 909. Appellant simply pulled up his pants (Tr. 3, 23). Third, Appellant did not flee or avoid the pat-down search, he *walked* out of a store (Tr. 5-6, 23-24). Finally, Appellant’s less-than-articulate way of exercising his Fifth Amendment right to remain silent, by cursing and not speaking with the officer, cannot be considered in determining reasonable suspicion (Tr. 5-6). None of these circumstances gave Officer Reynolds reasonable suspicion to believe that criminal activity was afoot. Despite the State’s assertion that Officer Reynolds was “armed with probable cause to effect an arrest,” the facts do not support this contention (Resp. Br. 18).

For the first time, the State argues that the marijuana was admissible under either the independent source² or the attenuation³ doctrines (Resp. Br. 18-19). The independent

² Evidence that is not causally linked to unconstitutional governmental activity is admissible pursuant to the independent source doctrine. The doctrine applies if the challenged evidence is (1) first discovered during lawful police activity; or (2) initially discovered unlawfully, but is later obtained lawfully in a manner independent of the original discovery. Murray v. United States, 487 U.S. 533, 536 (1988).

³ Evidence that otherwise qualifies as fruit of the poisonous tree may be admissible if its connection with the illegal police activity is so attenuated that it is purged of the taint. Nardone v. United States, 308 U.S. 338, 341 (1939).

source rule does not apply because in Appellant's case, the evidence was discovered unlawfully and was not obtained lawfully in a manner independent of the original discovery. Citing Segura v. United States, 468 U.S. 796 (1984), the State argues that the marijuana was derived from Officer Reynolds' lawful search incident to arrest that she conducted on Appellant after he pushed her (Resp. Br. 18).

In Segura v. United States, the evidence obtained was not the fruit of an unlawful entry into the defendant's home. 468 U.S. at 799. Officers had already applied for a search warrant based on surveillance they had been conducting for weeks, the information from the warrant came from sources unconnected to the illegal entry, and thus there was an entirely independent source for discovery of the evidence. Id. at 810-11. An analysis of cases with no "but-for" causation, is not relevant here. Additionally, because Appellant was acquitted of the assault of the law enforcement officer, the trial court did not believe Appellant pushed Officer Reynolds (Tr. 59).

The United States Supreme Court has held that three factors must be considered in evaluating attenuation: (1) the temporal proximity of the illegality and the acquisition of the derivative evidence; (2) the presence of intervening circumstances; and (3) the flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 603-04 (1975). In Appellant's case, the evidence was derived immediately from the unlawful arrest without any intervening events, and Officer Reynolds' arrest was flagrant rather than unintentional. See e.g. State v. Grayson, 336 S.W.3d 138, 147 (Mo. banc 2011) (The discovery of drugs was not attenuated from the illegal stop because it happened close in

time to the stop and the officer's conduct in conducting an illegal stop and detention is the type of conduct the exclusionary rule is designed to prevent).

The State also attempts to use cases where the defendants made pre-trial statements (Resp. Br. 20-23). These cases do not apply to this case because Appellant made no statements until the trial court erred in suppressing the evidence and testimony of Officer Reynolds (Resp. Br. 20-23).

As the State points out "Fahy is a fact-specific case," Appellant could not agree more and believes it is right on point with Appellant's case (Resp. Br. 25). As in Fahy v. Connecticut, this Court must find it was clear that the erroneous admission of this illegally obtained evidence was prejudicial to Appellant and cannot be called harmless error. 375 U.S. 85, 91-92 (1963).

The State also cites State v. Eacret, 456 S.W.2d 324 (Mo. 1970), where this Court declined to apply Harrison v. United States, 392 U.S. 219 (1968). Without waiving any arguments made in the amicus brief, another factor why the Eacret case should not apply in Appellant's case is because Eacret testified in his own behalf with consent of counsel *after a full and thorough explanation by the court of his right not to testify and admitting under oath his guilt was in effect a plea of guilty*. 456 S.W.2d at 327 (emphasis added). From our record, this explanation by the court did not occur in Appellant's case (Tr. 1-53). In order for this Court to apply Eacret, it only seems fair that Appellant would have been given this explanation so he could have decided whether to testify or not.

Based on Appellant's facts, the improper seized evidence and testimony was not harmless error. In Appellant's case, the seized evidence and Officer Reynolds' testimony

must be suppressed because there is no doubt that the evidence and testimony complained of resulted in Appellant's convictions. Thus, Appellant respectfully requests that this Court reverse his convictions and direct that Appellant be discharged from these sentences. Rule 30.22.

Conclusion

WHEREFORE, based on his arguments in Point I of his brief and Point I of his reply brief, Appellant requests that this Court reverse his convictions and discharge him this convictions and sentences.

Respectfully submitted,

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Certificate of Compliance and Service

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 14th day of May, 2012, a true and correct copy of the foregoing reply brief served via the efilng system to John.Reeves@ago.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this reply brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 1,936 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

/s/ Timothy Forneris
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